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In The

Supreme Court of the United States

PUBLIC LANDS COUNCIL, ET AL.,

Petitioners,

v.

BRUCE C. BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS CURIAE BRIEF ON BEHALF OF ALAMEDA BOOKCLIFFS RANCH, NEW MEXICO CATTLE GROWERS ASSOCIATION, NEW MEXICO PUBLIC LANDS COUNCIL, NEW MEXICO WOOL GROWERS ASSOCIATION, INC., ARIZONA AND NEW MEXICO COALITION OF COUNTIES FOR STABLE ECONOMIC GROWTH, PRODUCTION CREDIT ASSOCIATION OF NEW MEXICO IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Tenth Circuit erred in sustaining two federal livestock grazing regulations that had been struck down by the U.S. District Court for the District of Wyoming.[1] The first of these regulations abandons the adjudicated grazing preference in favor of "permitted use" ("Permitted Use Rule"). The second prospectively vests title in the United States to all range improvements on the public lands ("Range Improvements Rule"). This brief will demonstrate how these regulations violate the Taylor Grazing Act ("TGA") and cause pervasive damage to the western livestock industry, the financial services industry, the environment and the unique rural cultures of the American West.

ISSUES

1. Is the Bureau of Land Management ("BLM") grazing preference (i.e., preferred status in utilizing *available* forage up to an adjudicated limit) a grazing privilege "recognized and acknowledged" which must be "adequately safeguarded" under the TGA (challenge to the "Permitted Use Rule")?

2. Does the regulation prospectively vesting title to all range improvements in the United States contravene the TGA's requirement to adequately safeguard recognized grazing privileges and to stabilize the livestock industry (challenge to the "Range Improvements Rule")?

INTERESTS OF AMICUS CURIAE

This amicus brief is prepared on behalf of the Alameda Bookcliffs Ranch, the New Mexico Cattle Growers Association, the New Mexico Public Lands Council, the New Mexico

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[1] Both Appellants and Appellees have consented to the filing of this brief. Neither Appellants' nor Appellees' counsel authored this brief in whole or in part. No person or entity, other than the Amicus Curiae, their members, or their counsel made a monetary contribution to the preparation and submission of this brief. This brief was authored by Karen Budd-Falen and Jeffrey B. Teichert, attorneys of Budd-Falen Law Offices, P.C.

Wool Growers Association, Inc., the Arizona and New Mexico Coalition of Counties for Stable Economic Growth and the Production Credit Association of New Mexico. These individuals and organizations have a direct and substantial interest in the outcome of this case, specifically in maintaining the integrity of the grazing permits and leases[2] on lands managed by the BLM.

The Alameda Bookcliffs Ranch is a large "federal lands"[3] ranch located south of Vernal, Utah. As a federal lands ranch, its viability is completely dependent upon the use of its BLM grazing permits and the ownership of its range improvements. In 1992, the ranch had an estimated carrying capacity of 2500 head of livestock year around. Because only 27 percent of the ranch consists of property owned in fee simple, the vast majority of these 2500 head of livestock graze on BLM managed lands year around. In 1992, the fair market value of the Bookcliffs Ranch was $3,200,000. The appraisal estimating this value concluded that the "highest and best" use of the property was as a commercial ranching operation. Because of the small amount of private land owned by the Bookcliffs Ranch, without its BLM permits and its improvements on the BLM lands, the Ranch would be valueless.

The New Mexico livestock industry, specifically the New Mexico Cattle Growers Association ("NMCGA"), the New Mexico Public Lands Council ("NMPLC") and the New Mexico Wool Growers Association, Inc. ("NMWGA"), each representing its members, also has a substantial interest in the outcome of this case. The NMCGA, NMPLC and NMWGA are nonprofit associations formed and operated pursuant to NMSA § 53-10-1 to § 53-10-8. Among the purposes for the creation of these organizations is to ensure the continued viability of public lands ranching in New Mexico.

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[2] For purposes of this brief, the terms "permits" and "leases" are used synonymously.

[3] For purposes of this brief, the terms "federal lands" and "public lands" are used synonymously.

Many members of the NMCGA, NMPLC and NMWGA are federal lands ranchers. Many of these members are dependent upon their grazing permits on BLM managed lands and have been adversely affected by the BLM's Permitted Use Rule, particularly the BLM's elimination of their suspended grazing use. Additionally, many NMCGA, NMPLC and NMWGA members own the water rights and range improvements on their BLM managed allotments. These water rights and range improvements serve as the base property for their BLM grazing permits. Without the ownerships of these water rights and improvements, these permittees would no longer qualify to own BLM grazing permits and leases.

The Arizona and New Mexico Coalition of Counties for Stable Economic Growth ("Coalition") also has a vital interest in maintaining the use and integrity of BLM grazing permits. The Coalition is a non-profit membership corporation consisting of 19 county governments in Arizona and New Mexico, as well as numerous private individuals and businesses located within these two states. Each person, governmental entity or business joining the Coalition must make an application and pay the appropriate membership dues. The Coalition's mission includes protecting the rural economies of Arizona and New Mexico, reinstating and reinforcing the integrity of the federal lands multiple use policy, maintaining and increasing the economic base which results from the management of federal lands, establishing and protecting the private property rights of individuals and industries which are dependent on federal lands and monitoring the implementation of new regulations which impact management of the federal lands.

Additionally, many Coalition members are local governments responsible for both the conservation of natural resources within their counties and for the promotion of the health, safety, and welfare of their citizens. *See, e.g*, Ariz. Rev. Stat. § 11-806(B). The elimination of the livestock industry on BLM lands as a result of the challenged regulations will have a detrimental affect on the "health, safety and welfare of these citizens" as well as the natural resources within each member county.

Furthermore, many Coalition members are ranchers dependent on permits for use of BLM managed lands for livestock forage. Because of their dependence, these members will be substantially affected by the Tenth Circuit's decision allowing the BLM to eliminate their suspended use and to acquire title to all future range improvements.

The Production Credit Association of New Mexico ("PCA") was organized in 1934, the same year that the Taylor Grazing Act was signed into law. The PCA is part of the farm credit system, and is authorized to make short and intermediate term loans to agricultural producers in 32 of New Mexico's 33 counties. PCA's portfolio has historically consisted of loans to cattle and sheep operations. PCA is adversely impacted by the elimination of the grazing preference in favor of the Permitted Use Rule. PCA believes, as do other lenders, that the Permitted Use Rule weakens the livestock permittee's expectation of predictable tenure in the range. Because the Permitted Use Rule has lead to uncertainty, PCA is restricted in its ability to lend money to federal lands ranchers. The vast majority of the livestock operations in the State of New Mexico are heavily dependent upon the use of the BLM lands. Therefore, when regulations threaten the stability of BLM grazing permits as loan collateral, PCA will be adversely affected.

Additionally, because of the Range Improvements Rule, the PCA can no longer make loans for the construction of range improvements because title to these improvements belongs to the United States. The gradual loss of title to range improvements not only diminishes the value of the grazing permits and base property, but also weakens the value of such permits as collateral for loans. Because of these interests, these parties submit this amicus curiae brief supporting the reversal of the Tenth Circuit's decision in this case.

SUMMARY OF THE ARGUMENTS

This brief challenges two recently adopted BLM regulations. The Permitted Use Rule, 43 C.F.R. § 4100.0-5 (1998), bases decisions about the quantity of forage use authorized by

BLM grazing permits on "land use planning," rather than on long-standing preference adjudications. The grazing preference historically included an adjudicated quantity of forage which the permittee was entitled to use, if that quantity was available on the designated range or allotment. If the adjudicated quantity was not available, the preference entitled the permittee to graze whatever *quantity* of forage was available. This preference, with its quantity element, is among the grazing privileges "recognized and acknowledged" which must be "adequately safeguarded" under the TGA. 43 U.S.C. § 315b.

In contrast, the Permitted Use Rule eliminates the quantity element of the preference and takes the position that a preference is merely a priority position over other grazing permit applicants. However, a preference over others is illusory and provides no safeguard for grazing privileges if it does not specify the quantity of grazing it protects against allocation to others.

The Range Improvements Rule, 43 C.F.R. § 4120.3-2(b) (1998), vests title in the United States to all future improvements constructed on the public range, regardless of who pays for the improvements. The Range Improvements Rule also violates the TGA's requirement to adequately safeguard recognized and acknowledged grazing privileges by jeopardizing ranchers' qualifications for water based permits. In order to attach a BLM grazing permit to a private water right, the water must be "available and accessible to the authorized livestock when the public lands are used for grazing." 43 C.F.R. § 4100.0-5 (1994). Many water sources on public lands are not available and accessible to livestock without range improvements for the transportation of the water, either because of geographic factors or because of regulations preventing livestock presence near the water source. Without control and use of this water, the permittee cannot hold a BLM grazing permit. The Range Improvements Rule also makes it much more difficult for ranchers to obtain permission and financing to construct improvements, again jeopardizing the ranchers' access to water and their qualifications for grazing permits.

ARGUMENTS

I. The Permitted Use Rule Violates The TGA By Failing To Adequately Safeguard Grazing Privileges

A. The Permitted Use Rule

Under the prior definition, "[g]razing preference means the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee," 43 C.F.R. § 4100.0-5 (1994), including "both active and suspended use." 43 C.F.R. § 4110.2-2(a) (1994). Under this definition, the preference was not an absolute guarantee of livestock numbers, but entitled the rancher to utilize the maximum number of animal unit months ("AUMs")[4] the range would support, up to the adjudicated preference limit. P. Foss, *Politics and Grass* 148-49 (Univ. of Washington Press) (1960), Brief Amicus Curiae of Alameda Book Cliffs Ranch, et al., App. 12-14 (hereinafter, the appendix filed by these amici at the petition stage of these proceedings will be cited as "Petition App."). If grazing use was reduced, the permittee retained the suspended use to be reactivated when forage conditions improved. *Id.* In essence, the preference limit guaranteed the preference holder a preferred right to a fixed share (or percentage) of the forage "available" on his allotment. 43 C.F.R. § 4110.2-2(a) (1994). Once established, the grazing preference "is to be regarded as an indefinitely continuing right." *Shufflebarger v. Commissioner*, 24 T.C. 980, 992 (1955).

In contrast, under the Permitted Use Rule, "[p]ermitted use means the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs." 43 C.F.R. § 4100.0-5 (1998). The Permitted Use Rule bases

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[4] An AUM is the amount of forage that can be consumed by one cow or her equivalent for a period of one month. 43 C.F.R. § 4100.0-5 (1994) (1998).

grazing decisions solely on land use plans[5] without the guidance of the AUMs historically attached to the permit holder's base property. Additionally, under the Permitted Use Rule, the permittee is not entitled to reclaim suspended use AUMs if forage conditions improve, even if that improvement is brought about by the permittee. This seriously jeopardizes the permittees' tenure on the BLM lands.

B. History of Private Grazing on the Public Lands

1. Grazing Districts Reserve Public Land for the Primary Purpose of Grazing

Grazing on public lands began because the various Homestead Acts failed to provide adequate acreage to support a viable livestock operation in the arid west where forage was sparse. P. Foss, *Politics and Grass* 26-30 (1960), Petition App. 3-4, 9. Livestock operators therefore resorted to utilizing adjoining public lands for grazing. *Id.*, Petition App. 6, 9. As the number of ranchers utilizing the open range grew, competition for finite range resources intensified, causing "serious breaches of the peace and the loss of many lives." *Omaechevarria v. Idaho*, 246 U.S. 343, 344 (1918); *see also* Penny & Clawson, *Administration of Grazing Districts* in *The Public Lands* 461-62 (V. Carstensen, ed., University of Wisconsin Press 1962) (reprinted from 29 Land Economics 23-34 (1953)), App. 1-2. At the insistence of the ranchers themselves, Congress enacted the TGA in 1934 to bring order and predictability to public lands grazing. G. Coggins, et al.,

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[5] BLM land use plans are documents created pursuant to the Federal Lands Policy and Management Act ("FLPMA"). 43 U.S.C. §§ 1701 *et seq.* Land use plans generally establish (1) land areas for limited or restricted use; (2) allowable resource use; (3) resource conditions and goals; (4) program constraints and general management practices; (5) general implementation for planned activities; and (6) intervals for monitoring. 43 C.F.R. § 1601.0-5(k). Land use plans are to be amended or revised based on monitoring and evaluation of new data or a change in circumstances. 43 C.F.R. § 1610.5-6.

Federal Public Land and Resources Law 132 (3d ed. 1993), App. 3.

The TGA's policy of recognizing prior use was a codification of history.

> [S]ome of the earliest and most significant federal "land laws" were in part legitimizations of uses that were already taking place on the western lands by pioneers and entrepreneurs who, until such legislation was passed, technically were either trespassers[6] or at best mere licensees on the public domain.

P. Baldwin, *Legal Issues Related to Livestock Watering in Federal Grazing Districts*, Cong. Service Rep. Doc. No. 94-688A, at 4 (1994).

As stated above, before the TGA, most grazing on public land was conducted on open range where grazing was not restricted to particular areas and fencing out competitors was illegal. *Omaechevarria*, 246 U.S. at 349; Dep't of Agriculture Tech. Bull. 301 at 38 (April 1, 1932), App. 4. However, because of the disorder caused by open range grazing, many livestock operators resorted to fencing the unregulated range. P. Foss, *Politics and Grass* 30 (1960), Petition App. 6-8. "When the Taylor Grazing Act was passed, these privately owned fences on the public range were considered evidence of prior use of the lands and thus gave the owner preference in obtaining 'range rights' for his livestock." *Id.*

The purpose of the TGA is "to stabilize, preserve, and protect the use of public lands for livestock grazing purposes. . . . " *Barton v. United States*, 609 F.2d 977 (10th Cir. 1979). As the court in *Public Lands Council v. Babbitt*, 154 F.3d 1160 (10th Cir. 1998) explained, "Congress enacted the [TGA], establishing a threefold legislative goal to regulate the occupancy and use of the federal lands, to preserve the land and its resources from injury due to overgrazing, and 'to provide for the orderly use, improvement, and development of

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[6] "Grazing of livestock upon the public domain has always been allowed and declared by the courts not to be trespass." Dep't of Agriculture Tech. Bull. 301 at 38 (April 1, 1932), App. 4.

the range'." *Id.* at 1161. "One of the key issues the [TGA] was intended to address was the need to stabilize the livestock industry by preserving ranchers' access to the federal lands in a manner that would guard the land against destruction." *Id.*

With passage of the TGA, Congress allowed for the reservation of public lands for the primary purpose of grazing.[7] *See* Taylor Grazing Act, President's Statement of Approval, 1934 (Preface). Specifically, the TGA authorized the Secretary of the Interior (delegated to the Grazing Service, predecessor to the BLM) to create "grazing districts" on all unreserved public land. *Id.*; 43 U.S.C. § 315. These grazing districts were to "promote the highest use of the public land, pending its final disposal." *Id.* For a district to be created, the land must be "chiefly valuable for grazing [livestock] and raising forage crops." *Id.*

In addition to the President's statement, Congressional intent to reserve the land within grazing districts for livestock grazing and crops was also reflected in the debate regarding the TGA. As summarized in a 1994 report to Congress:

> During congressional debates on the TGA, members repeatedly referred to grazing district lands as being "reserved" for grazing purposes and analogized the grazing districts to forest reserves. Many provisions of the TGA deliberately parallel those of the Forest Organic Act of 1897. Grazing districts may be seen as being both "reserved" in the sense that they were removed from private appropriation and dedicated to a particular purpose, and as being "public lands" in the senses that private title to lands in grazing

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[7] As a legal matter, public land is "reserved" when it is set aside for a specific use or purpose. For example, the 1897 Organic Administration Act, 16 U.S.C. § 473, allowed for the creation of National forests. Under that Act, those forest lands were "reserved" for the specific purposes of timber production and watershed protection. *Id.* The Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 528, expanded the use of National forests to include outdoor recreation, grazing, watershed protection, and fish and wildlife production, so long as those uses were not in derogation of the primary purposes for which the National forests were intended. *United States v. New Mexico*, 438 U.S. 696, 705 (1978).

> districts *could* be obtained if the lands were reclassified for such acquisition. District lands were recorded on contemporaneous Department of Interior records as "Reserved Public Domain (Subject to Taylor Act)."

P. Baldwin, *Legal Issues Related to Livestock Watering in Federal Grazing Districts*, Cong. Service Resource Rep. Doc. No. 94-688A, at 46 (1994).

As is the case with most reservations of public land, the TGA also expressly withdrew the reserved land from all forms of entry of settlement. 43 U.S.C. § 315. Grazing districts "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry and settlement." *Id.* Thus, the designation of an area of public land as a grazing district effectively stopped other conflicting land uses, reserving the land for livestock use.

In addition, the creation of a grazing district meant that grazing must occur on the land.[8] As summarized by the Tenth Circuit, "Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing." *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999).[9] Thus, except upon the

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[8] The Secretary can modify the boundaries of a grazing district, but unless land is removed from designation as grazing, the Secretary must use it for grazing. 43 U.S.C. § 315. *See generally*, *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980) (holding that the intent of FLPMA was to limit the ability of the Secretary of the Interior to remove large tracts of public land from the operation of the public land laws).

[9] The Tenth Circuit also ruled that grazing permits may *only* be issued for grazing purposes and not for purposes such as conservation use. The court explained that while the Secretary may include considerations such as "conservation" within the terms of a grazing permit, and may even suspend grazing for a period of time if in the best interest of the range, permits are to be issued for grazing alone. *Public Lands Council*, 167 F.3d at 1308 (10th Cir. 1999).

showing of "good cause," the Secretary does not have discretion to bar grazing within a grazing district. *See* 43 C.F.R. § 4110.3 (1997) (stating that changes in grazing use "must be supported by monitoring, field observations, ecological site inventory or other data acceptable to the authorized officer.")

The TGA also sets forth the duties of the Secretary [BLM] with regard to grazing. The Secretary must "do any and all things necessary to accomplish the purposes of [the TGA] and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement and development of the range. . . . "[10] 43 U.S.C. § 315a. "The Secretary shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created. . . . " *Id.* Thus, under the TGA, the Secretary shall determine (1) who shall be allowed to graze within a grazing district (i.e., who will receive a preference right) and (2) the terms and conditions of such grazing to be included in the grazing permit.

2. The Creation of Preference Rights within the Grazing Districts

Preference rights determine who is entitled to graze livestock on the "reserved" public lands. The framers of the TGA recognized that for a rancher to successfully graze livestock on the public land, two things were necessary: 1) the ownership of private property near the public land which can serve as the base for a livestock operation; and 2) access to sufficient water supplies which may serve the needs of the livestock. 43 U.S.C. § 315b. Congress also recognized that the livestock industry would be best served if the ranchers who

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[10] According to the Public Rangelands Improvement Act ("PRIA"), "rangeland" or "public rangeland" means BLM administered land "on which there is domestic livestock grazing or which the Secretary concerned determines may be suitable for domestic livestock grazing." 43 U.S.C. § 1902(a).

were best able to practically utilize the public lands, and who were using the range at the time the TGA was passed, were allowed the right to graze on the public lands. *Id.* The TGA states:

> The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are *entitled* to participate in use of range. . . . *Preference shall be given* in the issuance of grazing permits to those within or near a [grazing] district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, *as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them* . . . except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan.

43 U.S.C. § 315b (emphasis supplied). Thus, owners of base property or water rights near a grazing district have a superior entitlement or "preference" to graze the public lands.

Preference rights also establish the amount or portion of grazing, described in terms of AUMs of forage, to which each person in the grazing district is entitled. Prior to 1995, the BLM regulations defined grazing preference as "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee," 43 C.F.R. § 4100.0-5, including "both active and suspended use." 43 C.F.R. § 4110.2-2(a) (1994). The preference was not an absolute guarantee of livestock numbers, but allowed the rancher the right to utilize the maximum number of AUMs the range will support, up to the preference limit. *Id.*; P. Foss, *Politics and Grass* 148-49 (1960), Petition App. 12. If grazing use ("AUMs") was reduced, the permittee retained his suspended use to be reactivated when forage conditions improved. *Id.*

Congress clearly intended for ranchers who have invested significant resources and time in grazing livestock on public land, and who are qualified permit holders under the TGA, to be entitled to grazing permits, through the system of preference rights. As stated by the courts, "Congress intended that under [the Taylor Grazing Act], livestock owners, who . . . have been for a substantial period of time bona fide occupants of certain parts of the public domain, and who are able to make the most economic and beneficial use thereof . . . are entitled to grazing permits. . . . " *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 313-14 (D.C. Cir. 1938). "We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress." *Id.* at 315. "[The] valuable nature of the privilege to graze which arises in a licensee whose license will in the ordinary course of administration of the Taylor Grazing Act ripen into a permit, makes that privilege a proper subject of equitable protection. . . . " *Id.* at 316. Likewise, the court in *McNeil v. Seaton*, 281 F.2d 931, 937 (D.C. Cir. 1960), commented that the grazing permittee is "entitled to rely upon the preference Congress had given him: to use the public range as dedicated to a special purpose in aid of Congressional policy. . . . Accordingly, [the] appellant [is] entitled to invest his time, effort and capital and to develop his stockraising business. . . . " *Id.*

C. The Grazing Preference is a Privilege That Must Be Adequately Safeguarded Under the TGA

After the TGA was passed, grazing districts were created and privileges were formally adjudicated in a process that took almost 20 years. *Public Lands Council v. United States Dep't of the Interior*, 929 F. Supp. 1436, 1440 (D.Wyo.

1996).[11] The Tenth Circuit mistakenly held that historic preference, allowing the permit holder "to graze predictable numbers of stock from permit to permit," was not a grazing privilege which must be "adequately safeguarded." *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1294 (10th Cir. 1998). This is in error. The long standing preference system made grazing numbers predictable by ensuring that the preference holder's share of the available forage, vis-a-vis the share granted to other permittees, would not change. The TGA specifically requires that the preference include a *quantity element*, stating that: "[p]reference shall be given in the issuance of grazing permits . . . as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by [the permittees]. . . . " 43 U.S.C. § 315b. Notwithstanding this language, in adopting the challenged regulations, the BLM stated that "preference" merely provides a priority over others, without specifying the quantity to which this priority applies. 60 Fed. Reg. at 9922. This violates the TGA's requirement that "grazing privileges recognized and acknowledged shall be adequately safeguarded." 43 U.S.C. § 315b.

1. Privileges "[S]afeguarded" Under the TGA Include the Recognition of "[G]razing [P]rivileges [R]ecognized and [A]cknowledged" Because of Prior Use

Although the TGA does not "*create* any right, title, interest, or estate in or to the lands," 43 U.S.C. § 315(b) (emphasis supplied), it does *safeguard* privileges that already existed by virtue of "previous use of the range." F.R. Carpenter, *Establishing Management Under the Taylor Grazing Act*, address at Montana State College (January 8, 1962), in 3 Rangelands 105, 111 (1981), Petition App. 14; *Public Lands Council v. Babbitt*, *cert. granted*, 67 U.S.L.W. 3773, 68 U.S.L.W. 3031 (U.S. Oct. 12, 1999) (No. 98-1991); *Public Lands Council*, 167 F.3d at 1310 (Tacha, J., dissenting, citing *McLean v. BLM*, 133 IBLA 225, 231-32 nn. 9-10 (1995)). During debate on the TGA, its sponsoring Congressman recognized the validity of grazing privileges springing from prior use:

> *There are many vested rights, which should and must be respected and protected, which have grown up on the range*. There are involved the rights of some who graze across State lines; and, naturally, they do not want those rights destroyed. They do not want to take any chances [by leaving grazing regulation to the states].

78 Cong. Rec. 5372 (1934) (statement of Rep. Taylor) (emphasis supplied). Farrington Carpenter, the first Director of the U.S. Grazing Service (predecessor agency to the BLM) also confirmed that previous use of the public range created privileges which should be "adequately safeguarded" under the TGA. Mr. Carpenter described the adjudication process as follows:

> [T]he Act [TGA] contained a clause that said we should protect prior rights. What were prior rights? *Prior rights were previous use of the range. . . .*
>
> . . . . After many, many battles this is what they finally decided. The rule was finally worked out that anyone who in the 5 years immediately preceding the Taylor Act had used the range in connection with his land, either continuously for 2 years or any 3 years in that period had prior use rights.

Carpenter at 111 (emphasis supplied), Petition App. 14-15; *see also* P. Foss, *Politics and Grass* 62-63 (1960), Petition App. 10-11.

Approximately three years after the TGA was enacted, the Interior Department issued a formal opinion stating that "prior use of the public lands for grazing purposes in connection with privately held property may be regarded as a most reasonable standard for the granting of grazing privileges." 56 Interior Dec. 62, 64 (1937). Only four years after the TGA was enacted the United States Court of Appeals for the District of Columbia held that:

> Congress intended that under [the TGA] livestock owners, who, with their flocks, have been for a

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[11] For a helpful review of the adjudication process, *see* F. Obermiller, *Public Domain Grazing Adjudications Under the Taylor Grazing Act* (unpublished manuscript), Petition App. 16-25.

> substantial period of time bona fide occupants of certain parts of the public domain, and who are able to make the most economic and beneficial use thereof because of their ownership of lands, water rights, and other necessary facilities, and who can bring themselves under a preferred class under the regulations by which the Secretary is authorized to implement in more detail the general policy of the [TGA], are entitled to grazing permits. . . .

Red Canyon Sheep v. Ickes, 98 F.2d 308, 313-14 (D.C. Cir. 1938). The TGA establishes that preference in the use of federal rangelands rightly belongs to individuals with a history of prior use, and that this preference is a grazing privilege "recognized and acknowledged" which must be "adequately safeguarded" under 43 U.S.C. § 315b.

2. The Grazing Preference was Historically Attached to the Permit Holder's Private Base Property and the Number of AUMs in the Preference was Based on the Carrying Capacity of the Permit Holder's Private Land

The preference included sufficient AUMs so that the preference holder could graze the same number of livestock on the public lands as he could on his private land. This policy is required by the TGA's explicit language that "[p]reference shall be given in the issuance of grazing permits . . . as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by [the permittees]. . . . " 43 U.S.C. § 315b. The first Director of the U.S. Grazing Service interpreted this provision to mean that authorized public lands grazing should accommodate the same number of animals as the base property owned by the permit holder, thus facilitating the "proper use" of base property:

> The act [TGA] furnished a clue to the method of allocating grazing privileges. "Preference," said the statute, "shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business . . . or owners of water rights. . . . " This clause restricted grazing rights to landowners or owners of water or

> water rights; the propertyless nomad was thereby eliminated from consideration. *The clause "as may be necessary to permit the proper use of lands" was interpreted to mean that the applicant must have private holdings sufficient to sustain his livestock when they were off the district, and conversely, that the district lands should complement his private holdings.* . . . The director, after meetings with the stockmen, decided upon an additional system of preferences based on customary past use of federal lands. This modified "squatter's right" idea was based on the old western common law of "first in time is first in right." The director found legal justification for this concept in the language of the statute which stated "grazing privileges recognized and acknowledged shall be adequately safeguarded."

P. Foss, *Politics and Grass* 62-63 (1960), Petition App. 10-11; *see also* Penny & Clawson, *Administration of Grazing Districts* in *The Public Lands* 466 (V. Carstensen, ed., University of Wisconsin Press (1962) (reprinted from 29 Land Economics 23-34 (1953))), Petition App. 28-29. The foregoing statement makes clear that the preference limits arose from a combination of the amount of prior use and the carrying capacity of the preference holder's base property.

The old Federal Range Code's definition of "base property" further demonstrates that the preference was to be based on the carrying capacity of the permit holder's private base property. According to the Code, "base property" is:

> Property used for the support of livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed without reference to forest permits or [other] complementary feed.

Federal Range Code § 501.2(e), Petition App. 26. Attaching the preference to the base property furthered the purpose of the TGA to "permit the proper use of lands, water, or water rights owned, occupied, or leased by [the permittee]." 43 U.S.C. § 315b. This requirement recognized the historic dependence of private ranches on the complementary use of public lands.

"landowners" had to be "engaged in the livestock business" to be entitled to a "preference." *Id.* Thus, the Tenth Circuit concluded that "bona fide occupants, settlers and owners of water or water rights" need not be engaged in the livestock business to be entitled to a "preference." *Id.* The Tenth Circuit's conclusion is not only at odds with the plain language of the Taylor Grazing Act, it completely disregards the Department's 61 years of consistent interpretation and administration of the Act.

The first sentence of Section 3 expressly limits the persons to whom the Secretary may issue a grazing permit, *i.e.*, "bona fide settlers, residents, and *other stock owners*." 43 U.S.C. § 315b (emphasis added). The phrase "other stock owners" modifies "bona fide settlers" and "residents" and plainly indicates that Congress intended for "bona fide settlers" and "residents" to also be "stock owners." Therefore, because only "stock owners" may be issued grazing permits, Secretary Babbitt's new "mandatory qualifications" rule is in direct and irreconcilable conflict with Congress' unambiguously expressed intent.

One reaches the same conclusion when the language of Section 3 is read "as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (words in a statute must be in the broader context of the statute "as a whole"). This section provides:

> [T]he Secretary of the Interior is hereby authorized to issue or cause to be issued *permits to graze livestock* on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled *to participate in the use of the range* . . . .

> Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them . . . .

43 U.S.C. § 315b (both emphasis added). Any reasonable person would agree that this language, "as a whole," indicates that Congress intended for the Secretary to issue grazing permits to only those engaged in the livestock business. Indeed, the whole section is concerned with who may be issued "permits to graze livestock" in order to "participate in the use of the range." *Id.* It makes absolutely no sense to interpret the section as authorizing the Secretary to issue grazing permits to those who have no intention of grazing livestock, but would rather have the land "sit idle."

That Congress intended for the Secretary to issue grazing permits to only those engaged in the livestock business is also confirmed by the Department's contemporaneous construction of the Taylor Grazing Act. After passage of the Act, the Department issued grazing permits to only those livestock operators who could demonstrate a prior use of the public lands for livestock purposes. Falen and Budd-Falen, *The Right to Graze Livestock on the Federal Lands*, 30 Idaho L. Rev. at 507-508. Indeed, as the Department explained:

> If one of the purposes of the Taylor Act is "to stabilize the livestock industry dependent upon the public range," it is obvious that this purpose is well served by granting grazing privileges to

> *applicants who are and have been operating going concerns in connection with the range . . . .*

The Nature and Extent of the Department's Authority to Issue Grazing Privileges, 56 I.D. at 66 (emphasis added). The Department also denied grazing permits to persons who had no livestock to graze. *Orin L. Patterson*, 56 I.D. 380, 381 (1938) ("the [Taylor Grazing Act] contemplates the awarding of preference rights not merely to owners but owners who are occupying and using contiguous lands *for the grazing of livestock*") (emphasis added). This contemporaneous construction of the Taylor Grazing Act by the Department is persuasive evidence that Congress intended for only those engaged in the livestock business to receive grazing permits:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration . . . *"Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charge with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'"*

Udall v. Tallman, 380 U.S. 1, 16 (1965) (quoting *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408 (1961) (quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933))).

CONCLUSION

It is a fundamental principal of the Separation of Powers Doctrine that the Executive Branch must execute the laws passed by Congress, even those it may find objectionable. The basis for this principle is that the laws passed by Congress are the results of the democratic process. Unless the Executive Branch can convince Congress to change the statutes it finds objectionable, its duty is to execute those statutes as Congress wrote them. This did not happen in this case. Instead, Secretary Babbitt chose to usurp Congress' legislative power by rewriting the Taylor Grazing Act. Accordingly, Northwest Mining Association respectfully requests that this Court reverse the decision of the Tenth Circuit.

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Id.; *see also* Federal Range Code § 501.2(e); § 501.4(a), Petition App. 26-27.

In summary, the right to utilize available forage, subject to the preference limit, is a privilege which must be "adequately safeguarded" within the strictures of the TGA. The preference is based on: (1) historic use of the range; and (2) the carrying capacity of the permit holder's base property.[12] The Permitted Use Rule eliminates the preference and violates the TGA.

D. The Permitted Use Rule Contravenes the TGA's Mandates to Stabilize the Livestock Industry and to Protect the Public Range

1. The Permitted Use Rule Destabilizes the Livestock Industry

The Tenth Circuit mistakenly stated that "[w]hile stabilizing the livestock industry is one of several purposes of the [TGA], PLC and the dissent place far too much weight on this point." *Public Lands Council*, 167 F.3d 1287 at 1298 (10th Cir. 1998). Instead the Tenth Circuit placed far too little emphasis on this point.

Congressman Taylor, author of the Taylor Grazing Act, stated that along with range protection and improvement, the purpose of the TGA to "stabilize the livestock industry dependent upon the public range" was "of the greatest and highest possible importance. . . . " 78 Cong. Rec. 5371 (1934) (statement of Rep. Taylor); *see also* TGA preamble, 48 Stat. 1269 (uncodified); *Chournos v. United States*, 193 F.2d 321, 323 (10th Cir. 1952); *Red Canyon Sheep v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938); *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829, 833 (D. D.C. 1974); Foss at 61-63, 72,

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[12] There are minor exceptions to base property ownership requirements. 43 C.F.R. § 4110.1-1 (1997); *see* 43 C.F.R. § 4130.5 (1997) (a grazing permit can be issued to persons who do not own or control base property if they graze livestock for subsistence purposes); 43 C.F.R. § 4130.6-3 (1997) (persons who do not own base property can acquire temporary "trail permits" to allow livestock to graze while crossing public lands).

Petition App. 9-12. The very purpose of the TGA is "to stabilize, preserve, and protect the use of public lands for livestock grazing purposes. . . . " *Barton v. United States*, 609 F.2d 977, 979 (10th Cir. 1979). Because the lack of predictable forage was the major destabilizing factor for livestock producers at the time of the TGA's passage, establishing "certainty of tenure" to graze reasonably predictable livestock numbers was considered essential. 78 Cong. Rec. 5374 (1934) (statement of Rep. De Rouen, quoting Interior Secretary Harold L. Ickes); *Id.* at 5376 (statement of Rep. De Rouen, quoting Agriculture Secretary H.A. Wallace). According to the Congressional record:

> [To stabilize the stock industry] is to make it possible for a farmer or ranchman engaged in either the cattle or sheep business to know just what range privileges he may expect and how many cattle or sheep he will be allowed to graze on this public domain.

78 Cong. Rec. 6356 (1934) (statement of Rep. Robinson).

Even today, the BLM admits that the grazing preference was the TGA's primary mechanism for safeguarding grazing privileges and stabilizing the livestock industry. According to the BLM:

> John Fowler states that historically "federal land policies have encouraged development and investment by the grazing permittee. The TGA provided enhanced stewardship, financially stable communities and livestock industry" (Fowler, 1994). *The key TGA policy is the Grazing Preference, which was adjudicated to provide security of tenure to encourage investment and commitment on the part of the rancher.* In return, TGA states that "Grazing privileges recognized and acknowledged shall be adequately safeguarded. . . . "

Bureau of Land Management, United States Department of the Interior, New Mexico Standards for Public Rangeland Health and Guidelines for Livestock Grazing Management: Draft Statewide Resource Management Plan Amendment/

Environmental Impact Statement ("New Mexico EIS") 3-55 (1999) (emphasis supplied), Petition App. 51.

According to Agricultural Economics Professor John M. Fowler, even today the elimination of the "grazing preference . . . and adding in its place the term 'permitted use' provides unusual latitude for the BLM to redefine authorized livestock use." J. Fowler, *Statement to the Committee for Energy and Natural Resources [of the] United States Senate on Rangeland Reform '94* (unpublished manuscript presented on May 14, 1994), Petition App. 32; *see also* Obermiller Aff. ¶ 8, Petition App. 34. This problem is particularly serious in the Southwest where most BLM grazing permits are tied to water rights serving as base properties. Penny & Clawson at 466, Petition App. 28; Fowler Aff. ¶ 10, Petition App. 38-39. Unlike deeded land, a water right on public lands is "virtually useless without a BLM grazing permit" because the water right owner must have a grazing permit to utilize the water right. Fowler Aff. ¶ 10, Petition App. 38-39. As stated by the U.S. Claims Court, owners of water rights "have a property interest in the . . . forage rights appurtenant to their water rights" and the denial of a grazing permit needed to utilize a water right would amount to an uncompensated taking of private property in violation of the Fifth Amendment. *Hage v. United States*, 42 Cl. Ct. 249, 250-57 (1998).

Congressman Taylor explained that providing predictable grazing expectations in federal lands would inspire the confidence of lenders and provide livestock operations with access to badly needed capital:

> I had the honor of being the acting chairman of this committee much of the time we frequently talked over this matter of . . . the stabilization of the stock industry on the public domain. You Members who do not live in that country may not realize that a herd of cattle or a flock of sheep are worth little or nothing unless the owner has a place to graze them; and *in order to build up or maintain and stabilize the stock-raising industry there must be some assurance as to where and what kind of range they may have and depend upon for their stock, what they can*

> *definitely rely upon in the way of pasturage*. Otherwise, there would be no permanence to the business. People who have herds would not be safe; they would have no credit with banks for securing money. *They cannot secure money from the banks if they cannot show that they have some definite and sufficient place on the range where their stock may be adequately grazed.*

78 Cong. Rec. 5371 (1934) (statement of Rep. Taylor) (emphasis supplied).

Because the Permitted Use Rule bases public lands stocking decisions on land use planning which can change (*see* 43 C.F.R. § 1610.5-6) rather than stable preference adjudications, the assurance of predictable livestock numbers will be eliminated, resulting in drastically reduced loan capital, loan availability and loan size. Obermiller Aff. ¶¶ 7-8, Petition App. 34; Fowler Aff. ¶ 11, Petition App. 39; Affidavit of Jack C. McCall ("McCall Aff.") ¶¶ 6-8, Petition App. 62; Affidavit of Jaqueline A. Buchanan ("Buchanan Aff.") ¶¶ 7-8, Petition App. 70; Affidavit of Jimmie C. Hall ("Hall Aff.") ¶¶ 6-7, Petition App. 74; Letter From Don Kidd, President and CEO of Western Commerce Bank to Connie Brooks (Oct. 29, 1998) ("Kidd") (unpublished), Petition App. 87-90. A right of "preference" over other potential users is illusory if it is not specified how large a share of the available forage the holder may claim in "preference" over others. Obermiller 2d Aff. ¶¶ 11-13, App. 8-9. In fact, as a result of the Permitted Use Rule, a majority of lenders in both the Pacific Northwest and the Southwest will no longer consider BLM grazing privileges in evaluating security for loans. Fowler Aff. ¶ 12, Petition App. 39; McCall Aff. ¶ 8, Petition App. 62.

Additionally, because of the loss of tenure security, BLM grazing permits will also no longer be considered in appraisals of ranch value either for purposes of sale or use of the ranch as collateral for a loan. McCall Aff. ¶ 7, Petition App. 62; Obermiller Aff. ¶ 7, Petition App. 34. Furthermore, young people desiring to enter the ranching profession will no longer be able to obtain financing, which guarantees that the industry will continue to dwindle. Kidd, Petition App. 90.

Most BLM ranchers operate on a one to two percent profit margin and are highly vulnerable to small fluctuations in cost or income that result from changes in public policy. Fowler Aff. ¶ 17, Petition App. 40; New Mexico EIS at 4-4, Petition App. 55-57. Thus, many BLM dependent ranches will be forced out of business because of probable livestock reductions[13] and the inability to obtain loans. Polley Aff. ¶ 6, Petition App. 92; Buchanan Aff. ¶¶ 8-9, Petition App. 70; McCall Aff. ¶ 7, Petition App. 62; Obermiller Aff. ¶ 10, Petition App. 35.

2. The Permitted Use Rule Places Agricultural Lending Institutions at Risk of Failure

As agricultural operations are driven into insolvency, their preexisting loans will also be placed in default, causing financial losses to agricultural lenders. Buchanan Aff. ¶ 8, Petition App. 70. This problem will likely affect between forty and ninety-five percent of existing BLM dependent loan portfolios. Buchanan Aff. ¶ 8, Petition App. 70; Kidd, Petition App. 89. In some cases, existing debts are secured up to ninety-five percent by BLM grazing permits. Buchanan Aff. ¶ 8, Petition App. 70. If these loans are subjected to "CLASSIFICATION" by Federal Deposit Insurance Corporation, all banks with significant permit-secured loans will be in danger of default to the Federal Reserve. Kidd, Petition App. 89. Losses of even twelve to fifteen percent of an institution's loan portfolios would present a serious threat of failure because of the losses themselves, and because of the resulting loss of confidence by underwriters. McCall Aff. ¶ 9, Petition App. 63. If BLM permits are rendered valueless by tenure insecurity, it is reasonable to predict a direct loss of approximately $1,000,000,000 to the BLM dependent livestock industry, which has an aggregate value of approximately

[13] Because many costs of production remain constant, livestock reductions increase the per cow cost of production and decrease profits. Obermiller Aff. ¶ 10, Petition App. 35; Polley Aff. ¶ 6, Petition App. 92.

$8,000,000,000 to $10,000,000,000. Obermiller Aff. ¶ 9, Petition App. 34-35. Losses will be felt by approximately seventy-five percent of the livestock industry in the Western states.[14] Obermiller Aff. ¶ 11, Petition App. 35.

E. The Permitted Use Rule also Presents Grave Threats to Ecosystem Health

"Range improvements are long term investments in the basic land resource that require years to yield a positive return to amortize the dollars invested." New Mexico EIS at 4-2, Petition App. 55; Fowler Aff. ¶ 14, Petition App. 39; McCall Aff. ¶ 10, Petition App. 63. Without the security of tenure provided by the historic grazing preference, permittees will not be willing to invest in range improvements to enhance ecosystem health. Fowler Aff. ¶¶ 14, 16, Petition App. 39-40; McCall Aff. ¶ 10, Petition App. 63. Furthermore, since the government no longer makes a long-term commitment to grazing permittees, lenders can no longer afford the risk of funding permanent improvements that require a considerable time to pay for themselves. Kidd, Petition App. 88; McCall Aff. ¶ 7, Petition App. 64. According to the BLM:

> Healthy ranges cannot be maintained without secure livestock operations. In short, as the range improves in productivity with the help of the rancher, the rancher should re-establish his or her profitability and pay the variable costs. *Once the profitability is achieved, the rancher will invest capital to improve the healthy ranges.* The improved healthy ranges will provide a more secure environment for family and community stability. *With improved security and stability, the rancher will have greater incentive to further invest in public land improvements.*

[14] The impact of instability in the livestock industry should not be measured only in dollar amounts. The author of the TGA indicated that "the small ranchman" was the interest the TGA was "most concerned about." 78 Cong. Rec. 5373 (1934) (statement of Rep. Taylor); *see also* 78 Cong. Rec. 6364 (1934) (statement of Rep. Taylor).

New Mexico EIS at 3-55, Petition App. 50-51. (emphasis supplied). The BLM goes on to state:

> The intent of Congress [in passing the TGA] was to provide stockholders with ". . . some type of assurance as to where and what kind of range they may have and depend on in the way of pasturage" (78 Congressional Record). The grazing privileges were subsequently adjudicated to determine who was eligible for a grazing preference. The term "grazing preference" represents a preference for a grazing permit. The grazing preference was attached to the base property of the ranch and was transferred to the party who owned or controlled the base property. The completion of the adjudication process provided predictability and security of tenure to livestock operators. This predictability and certainty in grazing permits provides the security to obtain financing for livestock capital, operations and improvements on the public land.
>
> . . . . Good range management and proper stewardship of the rangeland is ultimately linked to the security and tenure of the adjudicated preference grazing permit/lease, as expressed and demonstrated by a variety of public land research economists (Martin, 1981, Kelso, 1983, Archer, and Snider, 1984). When predictability and certainty are removed, not only do the ranch finances and family suffer, but the incentive for good stewardship and investment into healthy rangeland improvements is thwarted.

New Mexico EIS at 3-58, Petition App. 52-53. The BLM clearly understands that abolishing the grazing preference is destructive to tenure security, destabilizing to the livestock industry and devastating to rangeland health in contravention of the TGA.

F. The Permitted Use Rule is a Death Sentence to the Unique Rural Cultures of the West

> A family is a set of individuals bound by love, blood ties, and loyalty across generations, and when families are rooted in the context of farming or ranching for their livelihood, then economic crises concern much more than making ends meet. For families who have chosen farming or ranching it is more than a means of making money, *it is a generational way of life*. Let me repeat, although all of you know this well: When it comes to the impact of a farming or ranching economic crisis on families, it is about more than making money, it is about the continuance of a generational way of life that is rooted in history.

S. Brotherson, *Making Family Decisions in Farming and Ranching* <http://www.ag.ndsu.nodak.edu/conferen/change/seanweb.htm> (presentation given at North Dakota State University's Fall Extension Conference, Oct. 28, 1999) (emphasis original).

"The impact from changes to the range livestock industry will be negligible to the urban economies, but highly imposing to the rural counties with large acreage of BLM land." New Mexico EIS at 3-50, Petition App. 49. This will deprive counties of badly needed revenue for important programs affecting predator control, soil conservation, senior citizens and community centers, and employee salaries. Polley Aff. ¶¶ 7-8, Petition App. 92-93.

"Land is the life and well-being of the rural culture in New Mexico. Working the land is the center piece of their livelihood[.]" New Mexico EIS at 3-59, Petition App. 53. The unique culture and value systems of the rural West are deeply embedded in a sense of "*place*" meaning "the site or sites marking the life of a person, the story of their life and that of the lives that came before them." *Id.*, Petition App. 54. For the rural peoples of the West, "*place* and identity are virtually inseparable." *Id.* A forced separation of rural people from their lands "would destroy the very identity of those people." *Id.*

The rural cultures of the West include "a bond between people and place that is no less a bond than flesh and blood; it is wholly dependant upon the fabric of land, people, and community being intact and stable." *Id.* "It is within place that the values of a region are cultivated." *Id.*, Petition App. 55. If there is serious instability in the livestock industry, cultural values such as "self-sufficiency, hard work, and other

traits, such as community cohesion, cooperation and leadership associated with agrarian communities, could be altered" New Mexico EIS at 4-31, 4-54, Petition App. 58-60. A decline in unique rural cultures would result in "the descent toward a less centered, less self-reliant, more homogenous monoculture." *Id.* Given the devastating effect of the Permitted Use Rule and its contradiction to the TGA, the Tenth Circuit's decision should be reversed.

II. The Range Improvements Rule Violates The TGA By Destabilizing The Livestock Industry, Failing To Adequately Safeguard Grazing Privileges Based On Water Rights, And Causing Pervasive Damage to the Public Range

A. The Range Improvements Rule

For six decades, the BLM recognized that ranchers who constructed range improvements on the BLM lands held title to these improvements in proportion to their contribution toward the construction or maintenance of the improvement. 43 C.F.R §§ 160.25, 501.27 (1938); 43 C.F.R §§ 160.17, 161.14 (1955); 43 C.F.R § 4115.2-5 (1964); 43 C.F.R. § 4120.6 (1978); 43 C.F.R. § 4120.3 (1989); 43 C.F.R § 4120.3-2 (1994). In 1995, the BLM abruptly reversed this historical recognition and enacted a rule that vested the United States with title to all permanent range improvements authorized after August 21, 1995. The new rule reads, in relevant part:

> Subject to valid existing rights, title to permanent range improvements such as fences, wells, and pipelines where authorization is granted after August 21, 1995 shall be in the name of the United States. The authorization for all new permanent water developments such as spring developments, wells, reservoirs, stock tanks, and pipelines shall be through cooperative range improvement agreements.

43 C.F.R. § 4120.3-2(b) (1998).

B. The Range Improvements Rule Will Significantly Damage Water Property Rights and Attached Grazing Preferences

In order to attach a BLM grazing permit to a water right, the water must be "available and accessible to the authorized livestock when the public lands are used for grazing." 43 C.F.R. § 4100.0-5 (1994). Without the aid of "wells, reservoirs, and other improvements" authorized by Section 4 of the TGA, 43 U.S.C. § 315(c) ("Section 4"), many water rights would not be "accessible" to livestock. Furthermore, when the BLM excludes livestock from primary water sources to manage such areas, improvements such as water pipelines are often necessary to make water "available" to livestock as required for the water to qualify as base property under 43 C.F.R. § 4100.0-5 (1994). The inability to create improvements jeopardizes the status of water rights as base properties and therefore, jeopardizes the grazing privileges of permit holders.

Under a Section 4 permit, ranchers can construct and maintain improvements with their own money. 43 U.S.C. § 315(c). These improvements are then owned by the permittee. *Id.* A permit holder's willingness to pay for an improvement obviates the need to wait for government funding. The Range Improvements Rule eliminates this opportunity by requiring that "authorization of all new permanent water developments . . . shall be through cooperative range improvement agreements." 43 C.F.R. § 4120.3-2(b) (1998). Title to improvements authorized by cooperative agreements is held by the United States alone. Thus, under this rule, the United States will eventually acquire title to all range improvements because all privately owned improvements will wear out or become inefficient, and replacement will require a new improvement authorization under 43 C.F.R. § 4120.3-1 (1998). *See also* 60 Fed. Reg. 9934 (Feb. 22, 1995).

Notwithstanding the fact that title to range and water improvements is vested in the government, 43 C.F.R. § 4120.3-2(b) (1998), a permittee can be forced to sign a "cooperative range improvement agreement" or risk losing access to his water rights, 43 C.F.R. § 4120.3-1 (1998), and

may be forced to "maintain and/or modify range improvements on the public lands. . . . " 43 C.F.R. § 4120.3-1(c) (1998). The fact that the permittee may be required to expend his own funds and effort to construct and maintain improvements which he cannot own, constitutes unjust enrichment in favor of the government and implicates the "takings" clause of the Fifth Amendment.

If the federal government retains title, range improvements have no collateral value for securing credit. Buchanan Aff. ¶ 10, Petition App. 70-71; McCall Aff. ¶¶ 11-12, Petition App. 63-64; Hall Aff. ¶¶ 8-10, Petition App. 74-75. Lenders will, therefore, be unwilling to loan money to ranchers for projects that would protect and benefit the public range. *Id.* Inevitably, permittees will be unable to obtain loans to construct and maintain the improvements necessary to make water accessible to their livestock, which is necessary under 43 C.F.R. § 4100.0-5 (1998) for grazing privileges to attach to the water right.

The fact that private ownership of range improvements is being eliminated clears the way for the BLM to more easily reduce or eliminate permitted grazing. Buchanan Aff. ¶ 12, Petition App. 71; McCall Aff. ¶ 11, Petition App. 63. This possibility threatens the security of loans to BLM permittees, and makes lending institutions reluctant to do business with ranches. *Id.* The resulting financial destabilization in the livestock industry offends the purpose of the TGA to stabilize the livestock industry. TGA preamble, 48 Stat. 1269 (uncodified); 56 Interior Dec. 62 (1937); *Chournos v. United States*, 193 F.2d 321, 323 (10th Cir. 1952); 78 Cong. Rec. 5374 (1934) (statement of Rep. DeRouen); 78 Cong. Rec. 5376 (1934) (statement of Rep. DeRouen).

The extreme importance of water base properties to western livestock grazing cannot be overstated. Almost all of the grazing permits in the Southwest are water based. Fowler Aff. ¶ 10, Petition App. 38-39; Penny & Clawson at 466, Petition App. 28. Because private land is scarce in the Southwest, water rights are virtually the only base properties to which grazing privileges can be attached. The fact that the Range Improvements Rule jeopardizes access to water on public lands is a

very serious violation of the BLM's duty to adequately safeguard grazing privileges under the TGA. *See* 43 U.S.C. § 315b.

C. The Range Improvements Rule Discourages the Construction of Range Improvements and Encourages Environmental Degradation

As stated above, "range improvements are long term investments in the basic land resource that require years to yield a positive return to amortize the dollars invested." New Mexico EIS at 4-2, Petition App. 55; Fowler Aff. ¶ 14, Petition App. 39-40. However, ranchers will not be willing to invest in range improvements if they cannot hold title to them. As discussed at the Senate Committee for Energy and Natural Resources:

> STEWARDSHIP DISINCENTIVES
>
> Removing private incentive for investing in federal rangeland by retaining federal ownership of improvements and water rights, eliminating equity and increasing annual costs will not encourage better stewardship. The federal government will have to fill the void in management and investment; this will be extremely difficult in an era of reduced funding and down-sizing of agencies.
>
> *Improvements*:
>
> The regulations as proposed have two distinct provisions that will preclude economically justifiable longterm private sector investment in federal rangelands. The first disincentive is that permanent improvements and temporary improvements will be retained in ownership by the United States; this holds for all future permanent improvements and any temporary improvement if *any* portion of its cost was borne by the United States. In addition, exclusive right to use the improvement is not conferred. Even with a 10 year permit the long run nature of the improvement will not allow the private sector to recapture dollars expended.
>
> . . . .
>
> Market value of federal permits will further decline as this value is a reflection of carrying capacity and improvements.

J. Fowler, *Statement to the Committee for Energy and Natural Resources [of the] United States Senate on Rangeland Reform '94* (unpublished manuscript presented on May 14, 1994) ("1994 Fowler Presentation"), Petition App. 30-31; Fowler Aff. ¶ 14, Petition App. 39-40; Obermiller Aff. ¶ 13, Petition App. 35; Polley Aff. ¶ 8, Petition App. 92-93; McCall Aff. ¶ 10, Petition App. 63. In 1986, the State of New Mexico, using a similar rule, took title to all future livestock water developments on state lands. Fowler Aff. ¶ 15, Petition App. 40; 1994 Fowler Presentation, Petition App. 31 Since that rule was adopted, livestock permittees on state lands have literally made *no* livestock water improvements. *Id.*

The Range Improvements Rule is likely to have a similarly drastic result throughout BLM lands. Fowler Aff. ¶ 15, Petition App. 40; Polley Aff. ¶ 9, Petition App. 93; McCall Aff. ¶ 10, Petition App. 63. When this occurs, the BLM simply will not have the manpower or financial resources to construct all of the necessary range improvements. Fowler Aff. ¶ 16, Petition App. 40; 1994 Fowler Presentation, Petition App. 30. Thus, the Range Improvement Rule's discouragement of improvements is likely to result in serious environmental damage. Fowler Aff. ¶ 16, Petition App. 40; McCall Aff. ¶ 10, Petition App. 63.

CONCLUSION

The Supreme Court should reverse the Tenth Circuit's decision sustaining the Permitted Use Rule and the Range Improvements Rule.

RESPECTFULLY SUBMITTED this 3rd day of December, 1999.

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Penny & Clawson, *Administration of Grazing Districts in The Public Lands* 461-62 (V. Cartensen, ed., University of Wisconsin Press (1962) (reprinted from 29 Land Economics 23-34 (1953)).

* * *

Grazing by domestic livestock on the western range lands, other than the Spanish settlements, began with the famous Texas trail herds that brought hundreds of thousands of cattle into the Great Plaints area between 1865 and 1890. Around 1870 the large cattle ranches were established. By 1890 most of the open range was in full use by domestic livestock. The coming of the railroads in the early 1880's brought an influx of settlers that continued until the First World War. The open range was homesteaded rapidly and cattlemen were crowded to the point of resisting encroachment by force. With the homesteader came fencing and the wide open spaces were gone forever.

The cattlemen sought to control the range by acquiring the limited areas of meadow land and the better watering places. Competition was intensified with the coming of the sheepman who also acquired strategic footholds by "corraling" the water, and in some areas by acquiring portions of railroad land grants made up of alternate sections of land. The notorious sheep and cattle wars resulted.

Control of the range by ownership or control of strategic lands was successful only to a relatively minor degree. The philosophy became "first come, first served." This cut-throat competitive type of grazing had a

decidedly detrimental effect on the forage and land. Forage plants, under extreme heavy use, became weakened and the better plants, destroyed. In some areas vegetation became so sparse that serious erosion problems arose. Many of the stockmen knew the folly of this system of grazing but were helpless to correct it.

* * *

G. Coggins, et al., *Federal Public Land and Resources Law* 132 (3d ed. 1993).

By 1934, overgrazing and drought had reduced the public grazing lands, never very productive, to a state of crisis. Neither free access nor enlarged homesteads contributed to betterment of range conditions. Even the ranchers agreed that drastic action was necessary. The result was the Taylor Grazing Act of 1934, 43 U.S.C.A. § 315 et seq.

Dep't of Agriculture Tech. Bull. 301 at 38 (April 1, 1932)

* * *

Certain rulings of the Secretary of the Interior have been supported, and in 1885 Congress passed a law prohibiting the inclosure of lands of thee public domain with a fence. Grazing of livestock upon the public domain has always been allowed and declared by the courts not to be trespass.[35]

Thus arises the existing condition of the public domain. It is an open "commons" upon which the livestock of any citizen may graze without charge. No one has legal authority to appropriate a part of it exclusively to individual use, to inclose any part of it with a fence, or directly to prevent anyone from using it.

Since many of the plants growing naturally upon most of this public domain have some forage value, and such forage is free for the taking to him who can get it, there has been more or less competition for it since white men have occupied the region.[36] This "first come, first served" principle, when applied to free feed, usually

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[35] *Buford v. Houtz*, 133 U.S. 320.

[36] The writer once asked the chief of one of the Pueblo tribes of New Mexico why the grazing lands of their reservation did not show overstocking. His reply was that they had known for many years about what the range would carry and the tribe had maintained that limit. Most white men who have control do the same thing. Without control of prescribed areas, such regulatory measures can not be applied. The recognition of the necessity by the Indians had probably resulted in a tribal custom that is now obeyed without question.

results in friction or something worse, and then the police power of the State is invoked to maintain the peace.

* * *

UNITED STATES SUPREME COURT

No. 98-1991

PUBLIC LANDS COUNCIL, ET AL.,
Petitioners

v.

BRUCE C. BABBITT, SECRETARY
OF THE INTERIOR, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SECOND AFFIDAVIT OF FREDERICK W. OBERMILLER

I, Frederick W. Obermiller, do hereby swear on oath as follows:

1. My name is Frederick W. Obermiller.

2. I am over the age of 18 years and make this affidavit based on my personal knowledge.

3. My office is 232C Ballard Extension Hall, Oregon State University, Corvallis, Oregon 97331. My telephone number is (541) 737-1425.

4. I hold a Ph.D. in Agricultural Economics from the University of Missouri. I was awarded this degree in 1969.

5. I am a full Professor of Agricultural and Resource Economics at Oregon State University. I am an adjunct full Professor of Rangeland Resources and a member of the Honors College Faculty at Oregon State University. I am an affiliate full Professor of

Agricultural and Resource Economics at the University of Idaho. I do research, outreach, and teaching in my area of specialization – public land and resources law and policy. Classes taught in this current school year include Introduction to the American Legal System, Public Land Law Reform, Public Land Statutes and Policy, Public Land and Resources Law, and practicums in Scope of Executive Withdrawal Authority and the reach of the Wild and Scenic Rivers Act.

6. I have produced well over 100 scholarly publications regarding public land law and policy issues. I have testified before Congressional Committees in my area of expertise many times.

7. This affidavit supplements the testimony given in my first affidavit submitted to the United States Court of Appeals for the Tenth Circuit.

8. In the western United States, commercial ranches are sold based on their carrying capacity – the number of cattle or sheep the land can sustain year-round – not on the basis of acres of land. This is because grazing land varies greatly in productivity (one acre can support two cows per month in parts of Montana but only one cow for half a day in parts of Nevada) and because title to the federal lands appurtenant to privately-owned base properties is held by the Untied States. A typical western United States commercial ranch consists of a mix of private and federal lands, and about 75% of the commercial ranching operations in the 11 Western States fall into this mixed ownership category.

9. Consequently, the value of the ranch is jointly determined by the fee land and the federal land incident to that fee land by virtue of a grazing permit or lease defining and legally describing the privately owned base property to which the federal

grazing allotment is attached. This legal and economic relationship is not unique. It is exactly as with the value of an irrigated farm in the western United States being jointly determined by the fee land itself and the scope of the attached appropriative water right.

10. When the grazing permit system was originally implemented, the scope of the grazing permit/lease was measured on the basis of animal unit months ("AUMs") which is essentially the number of months of grazing by adult cows the federal grazing allotment could support on a sustained basis. This scope was adjudicated following a detailed range survey by trained General Land Office personnel assigned for survey purposes to the Division of Grazing (Control) in the Department of the Interior. If, based on survey results, demand for available forage exceeded supply, two events occurred. First, among those expressing demand, preference was given to ranchers who had consistently (over the five year period preceding 1934) grazed their stock on the federal land that was to become a grazing allotment under the Taylor Grazing Act. Second, the scope of preference, or number of AUMs permitted the rancher under grazing permit or lease, would be adjusted to equitably accommodate equally senior ranchers.

11. The purposes of the range survey were to classify those federal lands primarily suitable for livestock grazing and quantify carrying capacity so that grazing rights could subsequently be allocated consistent with that capacity among eligible ranchers via permits and leases, hence the terms "permittees" and "lessees." A key provision of the enabling legislation was to ensure that the grazing rights and privileges thus allocated were firm and secure such

that "no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee [*meaning fee land and appurtenant federal grazing allotment*], when such unit is pledged as security for any bona fide loan." 43 U.S.C. 315b.

12. The value of the grazing unit is as noted in paragraph 9 jointly determined by the fee land and the federal grazing allotment appurtenant to it via the grazing permit or lease. Thus the Taylor Grazing Act brought stability to the western livestock industry by ensuring that permittees and lessees would be secure in their tenure with prior knowledge that their grazing permit or lease was (1) renewable at the end of its term with preference given to the current permit holder assuming he or she had abided by the Secretary's rules and regulations, and (2) in an amount or scope as adjudicated. In other words, the entire grazing unit including the grazing permit or lease and its joint value could be, and to this day is, pledged as collateral on loans. If preference in either sense of the term were eliminated, the security of tenure that was one of the three primary public purposes of the Taylor Grazing Act would be frustrated – not to mention the financial stability of the associated banking industry.

13. In summary, preference means two things: (1) who gets the permit, or the right to renew it upon expiration of its term, and (2) quantity of forage authorized for use under the conditions of that permit.

14. If, then, any federal agency or agent reduces preference, the carrying capacity of the ranch is reduced accordingly. Presently, understanding that carrying

capacity is measured by the number of cows the ranch as a whole (fee land plus federal land) can sustain on a year-round basis, these western commercial cattle ranches are, to be conservative, valued at about $1,500 per cow, e.g., a typical family ranch capable of supporting 400 cows per year is conservatively valued at $600,000 at today's market.

15. Alternatively, if the usufructuary federal land grazing permit or lease has no scope, because one agency or agent refuses to recognize that the preference means both who and how much, in many cases the effect is to render the private fee land to which the grazing right is incident valueless for grazing purposes. If preference does not include historically recognized scope (AUMs of preference) billions of dollars of equity in western commercial cattle and sheep ranching operations is eliminated.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Frederick W. Obermiller
Frederick W. Obermiller

STATE OF OREGON)
) ss
COUNTY OF BENTON)

The foregoing instrument was acknowledge before me this 24th day of November 1999 by Frederick W. Obermiller.

Witness my hand and official seal.

[SEAL]

OFFICIAL SEAL
LOUISE E BARKER
NOTARY PUBLIC – OREGON
COMMISSION NO. A309034
MY COMMISSION EXPIRES APRIL 30, 2002

/s/ Louise E. Barker
Notary Public

My Commission Expires: 4/30/02

G. Coggins, et al., *Federal Public Land and Resources Law* 132 (3d ed. 1993)

By 1934, overgrazing and drought had reduced the public grazing lands, never very productive, to a state of crisis. Neither free access nor enlarged homesteads contributed to betterment of range conditions. Even the ranchers agreed that drastic action was necessary. The result was the Taylor Grazing Act of 1934, 43 U.S.C.A. § 315 et seq.